

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. M-05/12-327
)
 Appeal of)

INTRODUCTION

The petitioner sent an e-mail to the Human Services Board and others on May 16, 2012 stating he was not receiving his Choices for Care (CFC) services. Petitioner's correspondence was treated as a hearing request and a telephone status conference was scheduled for June 5, 2012.

During the June 5 telephone status conference, the issue was identified as terminations of home health services by both Central Vermont Home Health & Hospice and Bayada Home Health Care. The Department of Disabilities, Aging, and Independent Living (DAIL) has certain oversight over home health care terminations; the nature of that oversight is addressed below.

The case history is set out in the procedural history.

Procedural History

During the June 5 telephone status conference, DAIL was asked to provide copies of termination notices and clarify the status of any home health care terminations of service.

DAIL provided information from Central Vermont Home Health & Hospice and stated the opinion that the notice met regulatory requirements. DAIL was reviewing Bayada's notice. DAIL interpreted the petitioner's request for a fair hearing to mean that he did not want to go through the Commissioner's Review process.

Central Vermont Home Health & Hospice (CVHHH) issued a Notice of Discharge on May 8, 2012 based on the grounds that petitioner voluntarily requested discharge of services.

Bayada Home Health Care issued a Notice of Discharge on May 30, 2012 to be effective on June 15, 2012 based on the grounds that Bayada is unable to accept verbally abusive and threatening behavior to staff.

A telephone status conference was held on June 21, 2012 and petitioner stated he wanted to go through the Commissioner's Review process.

DAIL scheduled a Commissioner's Review for June 27, 2012 and provided a telephone number for petitioner to call into DAIL for the Review. DAIL sent petitioner notice by both first class mail and e-mail. Petitioner did not call in for the Commissioner's Review. Petitioner disputes that he had the responsibility to call in for the Commissioner's Review; he believes the Commissioner's Office should have called him.

Petitioner raised questions about receipt of the mailed Notice.

A telephone status conference was held on August 7, 2012 at which the Board learned that the Commissioner's Review did not take place. DAIL would not reschedule the Commissioner's Review.

Hearing was scheduled for September 19, 2012. Petitioner participated in the hearing by telephone. After the close of DAIL's case regarding CVHHH, Petitioner requested that the case regarding Bayada be heard at a different time. Petitioner's request was granted.

In terms of CVHHH, DAIL presented testimony from (1) JC, compliance officer at CVHHH, (2) SR, CVHHH CEO (CFO at time of termination of services) by telephone and (3) FK, from DAIL's Division of Licensing and Protection. Petitioner testified on his own behalf.

The following DAIL exhibits were admitted into evidence: (Dept. 1) CVHHH Case Communication Reports for the period of April 25 through May 9, 2012, (Dept. 2) May 1, 2012 note from SR of CVHHH and May 4, 2012 note from SR about petitioner's use of Michael's Fund, and (Dept. 3) May 8, 2012 Notice of Change to Your Home Health Services issued by CVHHH to

petitioner, and (Dept. 4) May 11, 2012 letter from CVHHH to petitioner regarding discontinuation of services.

The petitioner objected to the admission of the Department's exhibits. The petitioner's objections were overruled.

Fair Hearing Rule No. 1000.3(0)(5) states:

The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the hearing officer may allow evidence not admissible thereunder where, in his or her judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence is offered of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Depts. 3 and 4 are the Notices that triggered petitioner's request for hearing and are part of the administrative record. SR prepared Dept. 2 during the course of her interactions with petitioner; SR testified by telephone, authenticated the records and was subject to cross-examination. Dept. 1 (Case Communications Report) is a business record that meets the test of the type of records commonly relied on in the course of business. The entries are recorded contemporaneously by CVHHH employees and include date and hour in the course of their actions and interactions regarding CVHHH clients. The Case Communications Report is

consistent with the requirements of the regulations governing home health agencies.

At the close of the hearing, petitioner made a motion to recuse the Hearing Officer from his case.¹ The Chief Hearing Officer denied the motion on October 22, 2012.

Hearing was reconvened on November 19, 2012. DAIL presented testimony from (1) FK and (2) NM, regional director of Bayada. Petitioner testified on his own behalf. Bayada's May 30, 2012 Notice of discharge was admitted into evidence and will be noted as Dept. 5.

The decision is based on the evidence adduced at hearing.

FINDINGS OF FACT

1. The petitioner is disabled. Petitioner is in need of personal care services including LNA and homemaker services.

The petitioner was hospitalized during the fall of 2011 for surgery. CVHHH began services after that hospitalization. Petitioner was hospitalized again during February 2012 and released in April 2012. CVHHH once again provided a range of services including nursing assistance,

¹Petitioner asked the Hearing Officer to recuse herself after being asked whether he wanted to proceed against Bayada since he was so dismissive of Bayada's quality.

social work services, and homemaker services. The homemaker services were provided through Michael's Fund or by a contract through FAHC.

2. The CVHHH Case Communication Record for May 7, 2012 indicates petitioner was approved clinically for Choices for Care (CFC) but needed to complete the financial review for Long Term Care Medicaid.

Petitioner is now a CFC recipient.

3. CFC is a Medicaid waiver program that provides funding for personal care services or help with Activities of Daily Living and Incidental Activities of Daily Living.

CFC recipients receive case management services. Through case management services, a care plan is developed. Once the plan is in place, CFC personal care services can be provided.

The recipient has the option of obtaining personal care services either through an organization such as a home health agency or self-directing personal care attendants.

4. Petitioner is now self-directing his care. Petitioner prefers to receive personal care services through an organization. He wants the home health care closures overturned.

Central Vermont Home Health & Hospice (CVHHH)

5. Petitioner had ongoing disputes with CVHHH regarding scheduling of services and the identity of staff assigned to his case.

6. CVHHH is a home health agency operating under the Regulations for the Designation and Operation of Home Health Agencies (HHA Reg.). DAIL adopted said regulations.

7. CVHHH scheduled a number of services for petitioner including LNA services, social work services, and homemaker services. CVHHH staff had a number of clients during the days petitioner had scheduled services. When CVHHH staff saw other clients prior to petitioner's appointment, CVHHH staff members' duties with other clients could impact the petitioner's schedule.

CVHHH looked at who was available on a certain date to schedule services. For example, they looked at the list of homemakers to choose an available homemaker for petitioner once private funding was found for homemaker services. As a result, different homemakers provided services to petitioner. Petitioner wanted continuity in the identity of CVHHH staff providing services. There were particular staff that petitioner did not want scheduled for his services.

8. Petitioner wanted a schedule setting out the exact times services would be provided over a period of time. The petitioner wanted a two-week schedule.

The petitioner said he was frustrated when CVHHH services conflicted with medical appointments.

9. Starting April 27, 2012, the documentary evidence and testimony show repeated contacts between petitioner and personnel at CVHHH. The Case Communication Report shows telephone contact between petitioner and CVHHH staff on April 27 and 30 and May 1, 2, 3, 4, 7 and 8, 2012.

CVHHH responded to petitioner's requests for a schedule with specific dates, times, and names of CVHHH personnel for a two week period. CVHHH was unable to provide that level of detail but offered dates and approximate times of visits and then offered to call petitioner the evening before to give an approximate time of services.

The evidence shows that when petitioner made his requests, he repeatedly stated he would stop services through CVHHH if CVHHH could not meet his requests.

10. On May 8, 2012, the disputes between petitioner and CVHHH came to a head and CVHHH accepted petitioner's words that he no longer wanted CVHHH services.

11. CVHHH is required to document the circumstances when services are discontinued to a patient. The records for May 8, 2012 document those circumstances in petitioner's case when petitioner spoke with SB, Director of Clinical Services, and MW, Palliative/Hospice Manager. Petitioner terminated services at the end of the business day because CVHHH could not give him what he wanted. He had notified the CEO and the Chairman of CVHHH's Board of Directors.

12. CVHHH issued the Notice of Change in Your Health Care Services on May 8, 2012 and notified petitioner of the contents during a telephone call with petitioner that same day.

13. CVHHH had the sheriff's office serve petitioner with the Notice of Change in Your Health Care Services and the May 11, 2012 Letter confirming discontinuation of services.

14. CVHHH gave petitioner the contact information for Bayada Home Health Care in its May 11, 2012 letter to petitioner.

15. The form of the Notice conforms to the regulatory requirements to set out the reason(s) for discontinuing services, appeal rights, and contact information for

contacting the Office of Vermont Health Care Ombudsman and the Long Term Care Ombudsman.

16. The evidence shows that staff at CVHHH attempted to work with petitioner and address his concerns. Petitioner was not satisfied with the CVHHH response and ended CVHHH services.

Bayada Home Health Care

17. Bayada Home Health Care (Bayada) provides home health care in a number of states including Vermont. Bayada has several offices in Vermont and provides services throughout Vermont. Bayada is subject to the HHA Regulations.

18. Petitioner contacted Bayada on or about May 11, 2012. He became a patient at Bayada on the same date although there appears to be some confusion about his status since he was originally entered into the hospice program until his status was changed on May 15, 2012 to a CFC patient.

19. Bayada lined up homemaker services three times with the same homemaker but the homemaker refused to continue working with petitioner.

20. Petitioner was not satisfied with the services he received from Bayada.

21. NM is the regional manager for Bayada. He testified that Bayada found an aide to provide services to petitioner on May 26, 2012 and so informed petitioner on May 25, 2012. Petitioner declined the services because petitioner had scheduling issues with the times.

22. NM testified that his staff was concerned by the frequency of petitioner's telephone calls and his staff found petitioner's tone of voice and petitioner's threats to sue them unsettling. Bayada conferred with law enforcement due to its concerns.

23. Petitioner called the owner of Bayada and told the owner petitioner had his home address and was going to have pickets go to his home as well as complain to the State agency and contact the news media.

24. Petitioner told the aide who provided services that he had her address and he was going to sue her.

25. Petitioner believes that any threats he made were proper as an expression of his First Amendment rights and because he believes Bayada breached its contract with him. He indicated he was not threatening their lives.

26. The impact of petitioner's threats on Bayada is that Bayada staff were harassed as can be seen by Bayada's reaching out for law enforcement advice.

27. On May 30, 2012, NM spoke to petitioner and told him that Bayada was discharging petitioner as a patient. According to NM, petitioner's response was good and that he would see Bayada in court. Bayada sent a written discharge letter on May 30, 2012; the letter conformed to the regulatory requirements by setting out the reason for discharge, appeal rights, and Ombudsman contact information.

28. Bayada offered petitioner the contact information for the Visiting Nurse Association but petitioner refused the information.

29. Neither the record nor the testimony indicates what efforts were made to resolve the problems between petitioner and Bayada.

ORDER

The discontinuation of services by Central Vermont Home Health & Hospice is affirmed. The discontinuation of services by Bayada Home Health Care is remanded to DAIL to determine whether the provisions of the applicable regulations have been met.

REASONS

The Legislature enacted Title 33, Chapter 63 governing home health care programs. 33 V.S.A. §§ 6301 et seq. Policy

goals include ensuring home health care coverage throughout the state in a cost effective manner. 33 V.S.A. § 6301. DAIL is given the authority to adopt regulations setting minimum standards. The regulations include DAIL oversight of home health care agencies and provide patients a grievance or complaint process. 33 V.S.A. § 6303(a).

DAIL adopted Regulations for the Designation and Operation of Home Health Agencies, effective July 1, 2007. (HHA Reg.).

HHA Reg. VII sets out the reasons a home health agency can discontinue services to a patient and the process for doing so. The pertinent sections state:

7.1 A home health agency shall have policies and procedures regarding the discontinuation of services to patients. . . .

7.2 A home health agency may discontinue services to a patient when the home health agency determines:

(a) The patient has requested that the services be discontinued;

. . . .

(e) The patient, primary caregiver or other person in the home has exhibited behavior that is a safety risk to agency staff such as physical abuse, sexual harassment, threatening behavior or verbal abuse;

. . . .

7.3 When a home health agency identifies a need to discontinue or reduce services to a patient, the home

health agency shall provide a verbal notice, followed by a written notice, accessible to the patient.

(a) If services will be reduced or discontinued, the home health agency shall give written notice as follows:

(1) In general, written notice shall be provided by the home health agency at least 14 days prior to the discontinuation or reduction of services.

. . .

(3) Prior to discontinuing services for safety reasons to a patient or staff, the home health agency shall: . . . advise a patient that a discontinuation of services for safety reasons is being considered; make a serious effort to resolve the problem(s) presented by the patient's behavior or situation;; and document efforts made to resolve the problem(s) in the patient's clinical record.

In addition, HHA Reg. 7.3(b) sets out the notice provisions for discontinuation of services including recitation of appeal rights, if applicable. HHA Reg. 7.3(c) mandates that home health care agencies develop policies and procedures when discontinuing services for certain reasons such as 7.2(d). HHA Reg. 7.5 requires the home health agency to document the reasons in the patient file when services are discontinued.

Appeal provisions are set out at HHA Reg. XXI and provide that a patient can request a Commissioner's Review. A Commissioner's Review can then be appealed to the Human Services Board.

The appeal process to the Commissioner gives DAIL an opportunity to ensure that the home health agency followed the requirements for discontinuing services by looking not only at the form of the Notice but looking at whether the home health agency has attempted to resolve difficulties with the patient and whether the home health agency has properly documented its relationship with the patient and the discontinuation of services. DAIL has oversight responsibility of home health agencies. HHA Reg. XIX (Survey and Review) and Reg. XX (enforcement).

Here, the Commissioner's Review did not occur. DAIL conducts its Commissioner's Review in person or by telephone. When the Commissioner's Review is conducted by telephone, the petitioner calls into DAIL. Petitioner did not call into DAIL. Petitioner believes that DAIL should have called him. Although there was no Commissioner's Review, DAIL stands by the decisions of the two home health agencies and put on evidence to support discontinuing petitioner's services.

The evidence involving CVHHH shows that CVHHH met the underlying regulations by documenting its contacts with petitioner, its efforts to resolve difficulties, and acceding to petitioner's direction to close his case. The Notice provisions were followed. Sending the case involving CVHHH

back to a Commissioner's Review would be an academic exercise.

The evidence involving Bayada raises questions whether the regulations were followed regarding efforts to resolve safety issues and whether petitioner's records document what was done because this evidence was not provided at hearing. HHA Reg. 7.3(a)(3). For this purpose, the case is remanded to DAIL to perform its oversight function.

In conclusion, the petitioner's discharge by Central Vermont Home Health & Hospice is affirmed and the petitioner's discharge from Bayada Home Health Care is remanded to DAIL for review under the applicable regulations.

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